UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
DOMINO'S PIZZA LLC,	)	
	)	Case No. 29-CA-103180
Respondent,	)	
	)	
And	)	
	)	
FAST FOOD WORKERS COMMITTEE	)	
	)	
Charging Party.	)	
	)	

RESPONDENT'S REPLY BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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ATTORNEYS FOR RESPONDENT

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I. INTRODUCTION

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Respondent Domino's Pizza LLC (Respondent or Domino's) files this reply brief to counsel for the General Counsel's (General Counsel's) answering brief to Domino's exceptions to Administrative Law Judge Mindy E. Landow's March 27, 2014 Decision (Decision).

II. REPLY

The General Counsel's arguments in response to Domino's exceptions to the judge's Decision are entirely unpersuasive and should be rejected for the reasons set forth in Domino's exceptions brief and below.

A. The Opt-Out Provision in the Arbitration Agreement Means that Employees Do Not Have to Agree to Mandatory Arbitration as a Condition of Employment.

Domino's excepted to the judge's finding that all employees are required to accept the Arbitration Agreement (Agreement) as a condition of employment. (Respondent's Exceptions (R. Exs.) 3.) The record does not support that finding because the 30-day opt-out provision in the Agreement allows employees to work for Domino's without agreeing to mandatory arbitration. The General Counsel responds to Domino's exception by arguing, in conclusory fashion, that merely because employees may ultimately choose to opt out of the Agreement does not mean that it is not a condition of employment. (General Counsel's Answering Brief (GC Br.) pp. 2-3.) The General Counsel's argument elevates form over substance and should be rejected.

A "condition of employment" in this context refers to a prerequisite for being hired. All employers impose "conditions of employment" on applicants in this respect. Otherwise, virtually everyone who applied would be hired. Some "conditions" are required by Federal, State, or local laws and regulations. For instance, pursuant to Federal law, employers must require that applicants be of a certain age and be authorized to work in the United States in order

to be hired. Thus, if an applicant is 13 or is a foreign national without a valid visa, he or she will not have satisfied the "conditions of employment," and therefore, cannot work for the employer.

Other "conditions of employment" are imposed solely at the employer's discretion, most often so that the employer can ensure a safe and productive workforce. For example, although not typically required by law, an employer may require applicants to pass a criminal background check or a physical agility test in order to be hired. If the applicant fails the background check or physical agility test, he or she will not be hired.

Here, in contrast, agreeing to mandatory arbitration of employment disputes is not a "condition of employment" with Domino's because employees can opt-out of the Arbitration Agreement without impacting their job. Stated more plainly, *you do not have to agree to pre-dispute mandatory arbitration in order to work for Domino's*. To be sure, employees undisputedly can and do work for Domino's without being subject to the Arbitration Agreement. Indeed, the record demonstrates that, since 2009, over 254 employees have elected not to be bound by the Agreement. (R. Exh. 1.) There is no evidence that any of those employees who elected to opt out were adversely impacted by virtue of their decision. The judge, the General Counsel, and Charging Party all fail to recognize this critical distinction.

The notion that mandatory arbitration is a "condition of employment" for Domino's employees notwithstanding the 30-day opt-out provision is further undermined by comparing the opt-out provision with the legally required 30-day opt-out provision in a union security clause. Specifically, Sections 8(a)(3) and 8(b)(2) of the NLRA authorize employers and unions to enter into agreements by which employees may be required, as a condition of employment, to obtain and maintain "membership" in a union. The Act, however, expressly limits the authority of employers and unions to "condition" employment in such a manner by requiring that newly-

hired employees be allowed at least 30 days to decide whether to join the union. See Section 8(a)(3) ("[N]othing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment . . . .").[1]

Because the NLRA allows employees to "opt out" of joining a union within 30 days of being hired without risk of losing their job, it cannot be said that joining a union is ever truly a "condition" of being hired by an employer. If an employee does not want to join a union, they do not have to and can still work for the employer.

Similarly, Domino's allows employees to "opt out" of mandatory arbitration within 30 days of executing the Arbitration Agreement without risk of losing their job. Consequently, it cannot be said that executing the Agreement is a "condition of employment." If an applicant does not want to agree to mandatory arbitration, he or she does not have to and can still work for Domino's.

B. The Board's Decision in *D.R. Horton* is Readily Distinguishable

Domino's further excepted to the judge's failure to correctly apply Board law to the facts of this case. (R. Exs. 6-9, 17-18.) Notwithstanding all the reasons why the Board's decision in *D.R. Horton, Inc.*, 357 NLRB No. 184, slip op. (2012), is not valid precedent, see R. Br. pp. 6-16, Domino's specifically argued that the judge erred by not distinguishing that decision. The General Counsel responds that the Board's *D.R. Horton* decision is not distinguishable because Domino's Agreement, like the agreement at issue in *D.R. Horton*, "requires employees to litigate their employment disputes in an arbitral forum in an individual capacity, and thus restricts

[1] Notably, the fact that employees are, by statute, permitted 30 days to decide whether or not to join a union upon being hired by an employer with a union-security agreement in place further illustrates the reasonableness of Domino's 30-day opt-out period. If Congress believed 30 days was a sufficient time for employees to consider exercising their substantive right to join or not join a union, it certainly would not make sense to conclude that 30 days is an insufficient time for employees to agree to waive their *procedural* ability to collectively assert claims against their employer.

employees from engaging in collective or class action." (GC Br. p. 4.) The General Counsel's response is flawed in several respects.

First, the General Counsel's argument, like the judge's analysis, rests on the erroneous assumption that employees have a Section 7 right to engage in "collective or class actions." They do not. Collective and class actions are procedural devices for litigants. They confer no substantive rights. See *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 612-13 (1997); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Insurance Co.,* 559 U.S. 393, 407 (2010) (upholding the validity of Rule 23 under the Rules Enabling Act because "[i]t governs only 'the manner and means' by which the litigants' rights are 'enforced'"). Thus, it is improper for the Board to create for employees a substantive right to those devices under the guise of protecting their Section 7 rights to engage in concerted activity for mutual aid and protection.

Second, unlike in *D.R. Horton*, Domino's employees can elect not to agree to mandatory arbitration as a condition of employment. Consequently, *D.R. Horton* is not applicable because the Board did not consider whether a mandatory arbitration agreement precluding class arbitration that is not a condition of employment would similarly violate employees' Section 7 rights.

Third, employees who choose not to opt out of the Agreement are still not "required" to litigate their employment disputes in an arbitral forum. Employees can file charges with the NLRB, the Equal Employment Opportunity Commission (EEOC), or "an equivalent state or local agency," and the Agreement does not prevent those agencies from bringing class or collective claims for relief on behalf of employees where permitted by applicable law. Thus,

Domino's Agreement avoids the concerns raised by the agreement in *D.R. Horton*, in which employees purportedly had no means of collectively pursuing litigation of employment claims. Instead, Domino's Agreement "leaves open a judicial forum for class and collective claims, [and therefore,] employees' rights are preserved without requiring the availability of class-wide arbitration." 357 NLRB No. 184, slip op. at 16.

Accordingly, even assuming the validity of *D.R. Horton*, the General Counsel and the judge failed to properly distinguish it here.

III. CONCLUSION

Overwhelming judicial and Board authority confirm that the General Counsel's answering brief is unsupported and does not discount or discredit Domino's exceptions. As discussed in Domino's exceptions brief, and as explained further above in response to several key misstatements and flawed arguments in the General Counsel's answering brief, the judge's Decision is erroneous and should not be adopted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing **Respondent's Reply Brief to Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge** in the above-captioned case has been served on counsel for the General Counsel and on counsel for the Charging Party by electronic mail to:

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s/ Reyburn W. Lominack, III
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Dated this 6th day of June, 2014.